Levensverzekering en fiscaal overgangsrecht: Fiscale aspecten van het overgangsrecht met betrekking tot overeenkomsten van levensverzekering sinds de invoering van de Wet op de inkomstenbelasting 1964.
Kapelle, H.M.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
SUMMARY

This study has examined which aspects affect the evaluation which must be done to ascertain whether and to what extent, when formulating transitional fiscal law in the case of life insurance contracts, there are reasons for deviating from the general rule that, in principle, a law has direct effect, so as to satisfy the requirement that transitional law must be clear and uncomplicated while also being fair to the interests of the tax authority and those of the parties concerned in a contract existing at the time of the amendment to the law.

Chapter I described the structure of the study and formulated the issues. It also outlined the general framework of transitional law on the basis of the categories identified by Hijmans van den Bergh, with retrospective effect, with direct effect and with non-retrospective effect.

Chapter II described the views of various writers and agencies on transitional law in general and transitional fiscal legislation in particular. Special attention was paid to the question of what effect new laws should have under what conditions. On the basis of the literature described in this chapter, we find that the main rule is that, in principle, a law has direct effect. It is possible to deviate from this general rule only where special circumstances so require. The evaluation of whether and to what extent such circumstances are present must be carried out on the basis of the general principles of proper legislation which, in the case of the field being studied, can be divided into seven aspects which affect that evaluation in the specific sphere of transitional fiscal law concerning life insurance contracts. These seven aspects form the examination framework within which the evaluation should be carried out to ascertain whether and, if so, to what extent there are special circumstances which make it necessary to limit the direct effect of new legislation by formulating transitional fiscal law for life insurance contracts. These are formal legislation, legal certainty, equality, legitimate expectation, enforceability, cost and proportionality. After individual, close examination of all these aspects, the conclusion is that, given the specific character of life insurance contracts, in the case of such contracts there is in principle always reason to deviate from the general rule of direct effect. In the case of life insurance contracts it is necessary to adopt the principle that existing contracts should be respected unless there are special, substantial grounds for not doing so. The ideas described in this chapter formed the basis for formulating the basic conditions within which it is permissible to deviate from this principle and avoid (material) retrospective effect. These basic conditions mean that tax laws may have formal and/or material retrospective effect only if five conditions are met, namely:

- no expectations have been raised on the basis of promises which cease to be honoured with retrospective effect
- the amendment to the law is necessary to rectify an actual, serious weakness which leads to tax avoidance
- there is no question of unacceptable consequences for tax-payers
the retrospective effect is necessary to avoid announcement effects and/or inequalities as a result of leaks

the retrospective effect does not extend beyond the moment when tax-payers were informed of the legal amendment announced.

If and in so far as the transitional law examined by this study contains elements of material retrospective effect, these were examined in the light of these basic conditions. The study focused on transitional law concerning life insurance contracts during the period from the introduction of the Personal Income Tax Act 1964 up to 31 December 1997. It concentrated on Sections 75 (in the version up to 1 January 1992), 75, 76, 78a of the Personal Income Tax Act 1964, Sections 36, 37 and 38 of the Wages and Salaries Tax Act 1964 and Section 60 (5) of the Personal Income Tax Decree 1941. Sections 69 and 80b of the Personal Income Tax Act 1964 were also considered in passing.

Chapter III examined and described the transitional law concerning annuities which already existed at the time of introduction of the Personal Income Tax Act 1964, as contained in Section 75 of that law. The conclusion was that Section 75 was not included in the law until late in the day. According to the transitional rule, entitlements existing on 1 July 1964 and considered as annuities under the old legislation would continue to be regarded as annuities after that date. The concept of an existing entitlement was not specifically defined. It is evident from case law that the concept should be given a restrictive interpretation. I take the view that the concept of existing entitlement should be approached from the point of view of civil law. The limited retrospective effect of Section 75 (old) of the Personal Income Tax Act 1964 is acceptable on the basis of the principles for permitting retrospective effect.

Chapter IV considers transitional law in the case of annuities which already existed at the time of introduction of the first general tax reform ["Brede Herwaardering I"] set out in Section 75 of the Personal Income Tax Act 1964 in the version in force since 1 January 1992. Section 75 underwent radical amendment in the course of the changes made to the law by the first general tax reform. Owing to the wording chosen, the effect of the rule is very broad. Despite lengthy, thorough discussion in parliament, corrective legislation soon proved necessary. However, the corrections made are not sufficient. The rule in Section 75 (4) is illogical and inconsistent. This chapter set out a proposal for an amendment to the law which would eliminate this and may also counteract the obviously unintended use which is still possible even after the corrective legislation. In view of the statements made by the State Secretary for Finance when presenting the draft bill, the material retrospective effect of Section 75 is contrary to the principles for permitting retrospective effect.

Chapter V deals with the transitional law on endowment insurance policies which already existed at the time of the amending legislation to rectify the position on single premium policies as contained in Section 78a of the Personal Income Tax
Summary

Act 1964. The conclusion is that Section 78a strikes a balance between the conflicting interests of respecting existing contracts while counteracting improper or unintended use. The limited retrospective effect of Section 78a in its original version is acceptable on the basis of the principles for permitting retrospective effect. However, that is not true of paragraph 7 which came into force on 1 January 1992. Its material retrospective effect is contrary to the principles for permitting retrospective effect.

Chapter VI focuses on the transitional law on endowment insurance policies which already existed at the time of introduction of the first general tax reform set out in Section 76 of the Personal Income Tax Act 1964. The transitional law of Section 76 adopts a view which differs in principle from that of Section 75. In the case of endowment insurance policies which already existed on 1 January 1992, the interest component paid out is still taxed on the basis of the old rules. In other respects the new rules apply. Here, too, the expectations raised by the promises which the State Secretary made were not honoured in full. The interpretation of what a normal and usual option should mean is generous. Nevertheless, at some points there is a conflict with the principles for permitting retrospective effect. The main reason is the treatment applied under the new rules to cases where an endowment insurance policy which is otherwise subject to non-retrospective effect is assigned to a resident tax-payer.

Chapter VII deals with the transitional law in the Wages and Salaries Tax Act 1964 as contained in Sections 36, 37 and 38 for pensions and periodic benefits which already existed at the time of introduction of the second general tax reform ["Brede Herwaardering II"]). In the first instance, Section 36 was a very long and extremely complicated article. In the end it became a fairly short article which ensures that the requirements which have been imposed on a pension authority since 1 January 1995 do not apply to authorities in charge of existing entitlements. The transitional rule on periodic benefits to make up for past or future loss of income was not included in the proposed legislation until a later stage. The lack of any clear definition of the concept of an existing entitlement leads to confusion over what change may be made to an existing annuity right without forfeiting the transitional rules. In that chapter I argued in favour of adding a second paragraph to Section 37 whereby an annuity right as referred to in Section 37 can be converted to another entitlement of that type without forfeiting the old rules. I produced a specific proposal for this. Section 38 removed the material retrospective effect which the legislation proposed by the second general tax reform originally had as regards taxed entitlements which already existed prior to entry into force of the amended legislation but only led to payment of benefits after that date. Where applicable, the retrospective effect of these sections is not contrary to the principles for permitting retrospective effect.

Chapter VIII draws a comparison with some adjacent legal spheres such as the transitional law formulated at the time of introduction of the new Civil Code, the
Dependants Benefits Act, various amendments to the Pension and Savings Funds Guarantee Act, the restriction on interest deductible as special expenses and the clarification of the concept of life insurance by the Insurance Industry Supervisory Board.

On the basis of the transitional rules examined in the preceding chapters, Chapter IX finds that the literature considered and the parliamentary history of the legislation examined indicate that it is always necessary to evaluate the seven said aspects in order to ascertain whether, and if so to what extent, there are reasons for deviating from the general rule of direct effect. This chapter has tried to indicate how this evaluation might be carried out. For this purpose, the valuation of an aspect is first determined on the basis of the results of this study. Next, that valuation is examined in the light of practice via the results of a survey of all Dutch members of parliament.

My study reveals that legal certainty is the key aspect in the formulation of transitional tax law on life insurance. Equality comes second, legitimate expectation third and enforceability fourth, while cost is the least important in relative terms. The survey of members of the Upper and Lower House reveals that the views of those involved in passing legislation do not differ from these conclusions on this point. One striking point which emerges from the study is that, in practice, those involved in passing legislation do not behave as one might expect from the results of the survey. When it comes to the crunch, cost often seems to play an important if not decisive role.

This chapter proceeds to make some recommendations on transitional tax law in the case of life insurance contracts. They may be summed up as follows:

1. in principle nor material nor formal retrospective effect
2. transitional law must contain a sound, clearly worded definition of the concept of an existing entitlement
3. two requirements apply when it comes to deciding whether there is an existing contract: there must be a consensus ad idem and the first or only premium must have been paid
4. the date of payment of the first or only premium is the date on which the creditor’s account was credited
5. in principle, any change to an existing entitlement leads to a new entitlement unless the collaboration of the insurer is not explicitly required for that change
6. there should be no reference to legislation which no longer exists
7. transitional law must be included in the proposed legislation from the start
8. either old rules or new rules, no interim forms.

If these recommendations are adopted, we shall have a transitional arrangement whereby the evaluation necessary to determine whether and to what extent there are special circumstances which justify deviation from the general rule can be carried out in a responsible manner on the basis of the seven aspects described in this study. The seven aspects which play a role in the formulation of transitional
law for life insurance policies are then in balance with one another and equal account has been taken of the interests of both the government and the tax authority.

The starting point here is that, in principle, non-retrospective effect should apply throughout their term to contracts existing on the date of the amendment to the law, unless there are special, serious grounds to the contrary.